

**SEPARATE CONCURRING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ  
IN THE CASE OF MÉMOLI v. ARGENTINA**

I agree fully with all aspects of the judgment delivered by the Court; hence, the purpose of this separate opinion is to emphasize some points that I consider particularly important.

**I. General principles established in the case law of the Court**

1. This case, as several others decided previously by the Court,<sup>1</sup> raises the issue of the relationship between the right to honor and dignity, or private life, and freedom of thought and expression. Both are rights recognized by the American Convention on Human Rights, in Articles 11 and 13, regarding which the Court has established a series of important general principles in its case law that are reaffirmed in this Judgment.

*Two fundamental rights that must be harmonized*

2. As the Court has established, it is necessary to harmonize the two fundamental rights that, in certain cases, are in conflict.

3. When analyzing this exercise of harmonization, it is interesting to recall some aspects of the drafting of the Convention. Articles 8 and 10 of the draft prepared by the Inter-American Council of Jurists were similar to Articles 11 and 13 of the final text, but contained some significant differences to the latter, particularly in the case of the right to honor and dignity. Several of the changes approved finally by the Inter-American Specialized Conference on Human Rights held in November 1969 in San José, Costa Rica, arose from proposals made previously when the OAS Member States and the Inter-American Commission on Human Rights commented on the original draft.

4. At that stage, the 1959 Symposium held at the Faculty of Law and Social Sciences of Montevideo,<sup>2</sup> with the participation of the Faculty's foremost professors of constitutional law, administrative law, and international law, had particular significance. During the deliberations, special attention was paid to Articles 8 and 10 of the draft and several amendments were proposed that, at the end of the day, became part of the text of the Convention.

5. With regard to Article 10 of the draft (then entitled "Freedom of expression of thought and of information), an extremely important suggestion was made concerning paragraph 4, which allowed prior censorship of public entertainments "for the sole purpose of safeguarding national morals, prestige or security." Professor Eduardo Jiménez de Aréchaga recalled that the Uruguayan delegation had proposed the prohibition of prior censorship and

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<sup>1</sup> *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111; *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177; *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009 Series C No. 193, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238.

<sup>2</sup> *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile*, Biblioteca de Publicaciones Oficiales de la Facultad de Derecho and Ciencias Sociales de la Universidad de la República Oriental del Uruguay, Montevideo, 1959.

that, following an indication that it was necessary in order to ensure “the protection of children and adolescents,” had proposed that it was “exclusively for the moral protection of childhood and adolescence.” At the proposal of Professor Aníbal Luis Barbagelata and the Dean, Juan Carlos Patrón, the Symposium recommended the text of paragraph 4 that was the one finally included in the Convention according to which prior censorship of public entertainments was allowed “for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”<sup>3</sup>

6. Article 8 of the draft was entitled “Right to the inviolability of the home and to honor,” and the text was as follows: “Everyone has the right to the protection of the law against arbitrary or unlawful interference with his private life, his family, his home, or his correspondence or of attacks on his honor or reputation.” Several of the participants in the Symposium referred to the matter, and Professor Barbagelata suggested that “instead of referring indirectly to the right to honor or reputation, the right to honor could be affirmed directly,” in the following terms: “Everyone has the right to honor and recognition of his dignity.” Finally the following text was approved:

1. *Everyone has the right to honor and recognition of his dignity.*
2. *No one may be the object of arbitrary or illegal interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.*
3. *Everyone has the right to the protection of the law against such interference or attacks.*<sup>4</sup>

7. The text approved in the Symposium finally became Article 11 of the Convention, with only some amendments to the wording (“his honor respected” instead of “honor” in paragraph 1; substitution of the word “illegal” by the word “abusive” to describe the interference prohibited; characterization of attacks on honor and dignity as illegal). The change is important, because it entails the direct, rather than the indirect, recognition of the right to honor and dignity, and recognizes the right to protection against interference or attacks.

8. Thus, from both the direct examination of the Convention and the analysis of the process that led to the final adoption of Articles 11 and 13, it can be inferred that freedom of thought and expression, and the right to respect for honor and reputation and the recognition of the dignity of every person are fundamental rights of every human being, on an equal footing, and without *a priori* being able to assign priority or prevalence to either of them. In each case, the two rights must be weighed, taking all the pertinent facts into consideration.

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<sup>3</sup> *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile, supra*, pp. 84 and 85. In the final text of the Convention the words “Notwithstanding the provisions of paragraph 2 above” were added to paragraph 4. Also, paragraph 5 was added, which contains the prohibition of any propaganda for war and any advocacy of national, racial, or religious hatred. In the instant case, this aspect has no significance; hence, it is not developed in the main text. However, in this footnote, it is worth pointing out that Professor Barbagelata said that he found the part of the text of the draft that referred to the safeguard “of national prestige and security” totally unsatisfactory, as it could be “an indirect way of limiting artistic freedom and freedom of thought.” He could not conceive of “a situation in which public amusements could affect national prestige and security.” Other important proposals were also made that were subsequently included in the Convention; among the most significant was the addition of paragraph (a) to Article 32 (inspired by article 72 of the Uruguayan Constitution and proposed by Professor Alberto Ramón Real), the text of which was as follows: “The enumeration of rights and guarantees included in this Convention does not preclude others that are inherent in the human personality or derived from the republican and democratic form of government” (*Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile, supra*, pp. 164 and 165 and 227). This proposal led to what would finally be paragraph (c) of Article 29 of the Convention.

<sup>4</sup> *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile, supra*, pp. 80 and 81.

### *Limitations to rights*

9. Article 29(d) of the Convention establishes that “No provision of this Convention shall be interpreted as [...] excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.” Consequently, Article XXVIII of the Declaration is applicable, according to which “The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”

10. Specifically, in relation to freedom of thought and expression, Article 13(2) of the Convention establishes the following:

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a) respect for the rights or reputations of others; or
- b) the protection of national security, public order, or public health or morals.

In other words, in the case of freedom of thought and expression there are specific limits that – respecting the requirements that it is “subject to *subsequent* imposition of liability” “expressly established by law” – explicitly establish the need to ensure “respect for the rights or reputations of others.” Meanwhile, the Convention does not include any provision that establishes specific limits to the right to honor or reputation and to dignity. Moreover, it would be very difficult, if not impossible, to imagine a situation in which the exercise or enjoyment of this right could affect another right, in a way that would entail the application of the general limitation indicated in paragraph 8.

11. Nevertheless, in its previous judgments, the Court has understood that in certain precisely defined cases, the right to honor must cede to freedom of thought and expression, owing to the importance of the latter for a democratic society. In the following paragraphs, the elements that, in specific circumstances (which, as will be seen, are not present in the instant case) entail the prevalence of one right over the other are analyzed.

### *The weighing up between the two rights*

12. The Court initiated its reasoning by proclaiming the equivalence of the two rights and the need to weigh them and to harmonize them. For example, in one case it stated the following:

The Court recognizes that both freedom of thought and expression and the right to have one’s honor respected, as enshrined by the Convention, are fundamental rights. It is, therefore, imperative to ensure the exercise of both. In this regard, the prevalence of either of them in a particular case will depend on the considerations made as to proportionality. The solution to the conflict arising between some rights requires examining each case in accordance with its specific characteristics and circumstances, considering the existence of elements and the extent thereof on which the considerations regarding proportionality are to be based.<sup>5</sup>

And, further on in the same judgment, it stipulated:

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<sup>5</sup> *Case of Kimel v. Argentina, supra*, para. 51.

The need to protect the right to have one's honor respected and one's dignity recognized, as well as other rights which might be affected by the abusive exercise of freedom of thought and expression, requires due compliance with the limitations imposed by the Convention in this regard. These limitations must be in accordance with strict proportionality criteria.<sup>6</sup>

In another case (in which the dispute arose between the right to privacy and freedom of expression), the Court stated:

In this context, the Court must find a balance between privacy and freedom of expression that, without being absolute, are two fundamental rights guaranteed in the American Convention and of great importance in a democratic society. The Court recalls that each fundamental right must be exercised respecting and safeguarding the other fundamental rights. In this process of harmonization, the State plays a central role seeking to establish the necessary responsibilities and penalties to achieve this end. The need to protect the right that could be harmed by an abusive exercise of freedom of expression calls for due observance of the limits established in this regard by the Convention itself.<sup>7</sup>

13. In the cases submitted to the Court to date, the decision adopted has favored freedom of expression, based on a reasoning that, on the one hand, underlines the particular importance of this freedom for the functioning of a democratic society and, on the other hand, reduces the importance of the protection of honor in the case of public officials or public figures, provided that matters of public interest are involved.

#### *Particular importance of freedom of expression*

14. The Court has emphasized the particular importance of freedom of expression in a democratic society in the following terms, which I share:

In its case law the Court has established that the social media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and, for this reason, it is indispensable that they reflect the most diverse information and opinions. The said media, as essential instruments of freedom of thought and expression, must exercise their social function with responsibility.

Given the importance of freedom of expression in a democratic society and the elevated responsibility that this entails for professionals involved in the area of social communication, the State must not only reduce to a minimum the restrictions on the circulation of information, but must also ensure, insofar as possible, the balanced participation of diverse information in the public debate, encouraging the pluralism of information. Consequently, the flow of information must be regulated by equity. It is in these terms that the protection of the human rights of the individual in the face of the power of the media, and the attempt to ensure structural conditions that allow the equitable expression of ideas can be explained.<sup>8</sup>

#### *Lessening the importance of the protection of honor*

15. In addition, the Court – in case law that I endorse – has indicated repeatedly that, when public officials or public figures are involved and the statements to which the case refers relates to matters of public interest, the intensity of the protection of honor is lessened. In particular, in the Kimel case, it stated:

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<sup>6</sup> *Case of Kimel v. Argentina, supra*, para. 56.

<sup>7</sup> *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 50.

<sup>8</sup> *Case of Fontevecchia and D'Amico v. Argentina, supra*, paras. 44 and 45.

Regarding the right to have one's honor respected, the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic system is encouraged. The Court has pointed out that in a democratic society political and public personalities are more exposed to scrutiny and the criticism of the public. This different threshold of protection is due to the fact that they have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond the private sphere to enter the realm of public debate. This threshold is not based on the nature of the individual, but on the public interest inherent in the actions he performs, as when a judge conducts an investigation into a massacre committed in the context of a military dictatorship, as in the instant case.

The democratic control exercised through public opinion encourages the transparency of State actions and promotes the responsibility of public officials in the performance of their duties. Hence, the greater tolerance for the statements and opinions expressed by individuals in the exercise of such democratic powers. These are the requirements of the pluralism inherent in a democratic society, which requires the greatest possible flow of information and opinions on issues of public interest.

In the domain of political debate on issues of great public interest, not only is the expression of statements that are well received by public opinion and those that are deemed to be harmless protected, but also the expression of statements that shock, irritate or disturb public officials or any sector of society. In a democratic society, the press must inform extensively on issues of public interest which affect social rights, and public officials must be accountable for the performance of their duties.<sup>9</sup>

## **II. Application of the general principles to the instant case**

16. It is precisely the application of the general principles established by the Court in its case law that led, in this case, to the decision in favor of the right to honor and reputation of the persons to whom Messrs. Mémoli referred in the statements on which the Argentine system of justice based itself to convict them. To reach this decision, the Court took into account, in particular, the circumstance that the Argentine judicial authorities examined the contested statements in detail and, regarding most of them, reached the conclusion that they did not constitute an offense. In other words, it was considered that the said statements did not constitute an abusive exercise of freedom of expression.

17. I emphasize, in particular, the importance of what is stated in paragraph 141 of the Judgment (with the clarifications contained in footnotes 262 to 264):

[T]he statements of Messrs. Mémoli were examined in detail by the domestic judicial authorities when deciding the criminal conviction against them. When reviewing the need to establish criminal sanctions against Messrs. Mémoli, the courts of both first and second instance examined thoroughly the characteristics of the statements made by Messrs. Mémoli based on which the complaint had been filed against them. In this regard, the Court notes that:

(i) the convictions for defamation were the result of a detailed analysis of each of the interventions, exempting Messrs. Mémoli of responsibility for statements considered "opinions that did not disparage the complainants" and holding them responsible for statements included in the said interventions that, in the understanding of the domestic judicial authorities, had exceeded a simple opinion or analysis of the news, with the purpose of disparaging or defaming one or several of the complainants or, for example, constituted "a voluntary digression to insult them," without being "necessary or essential for the claim made";

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<sup>9</sup> *Case of Kimel v. Argentina, supra*, paras. 86 to 88.

(ii) the domestic courts verified the existence of *animus injuriandi* or malice as regards the statements for which they were convicted;

(iii) they acquitted the presumed victims for most of the interventions based on which the complaint was filed, as well as for the offense of libel, and

(iv) when acquitting them for these statements, the domestic courts distinguished that some of these statements constituted opinions or were of a hypothetical nature in order to exempt them from criminal liability for the offense of libel and defamation, or constituted "accounts of facts or "newspaper stories."

18. It is important to underline that following the judgment in first instance (subsequently confirmed on appeal) that had rejected the existence of wilful intent in the case of the burial vaults, Pablo Mémoli published an article entitled "*Caso Nichos: el Juez dijo que los boletos de compraventa son de objeto imposible e inválidos*" [Burial vaults case: the judge said that the object of sales contracts is impossible and invalid], which included the following passage: "This newspaper, under the responsibility of its director, considered the act to be presumed fraud, and we continue to maintain this, because the case file reveals the fraud from the evidence provided by the accused who did not hesitate to be (mendacious) and (fallacious), before the courts themselves" (judgment, para. 81 and footnote 113).

19. In addition, it is clear that this case does not include any of the circumstances on which the prevalence attributed to freedom of expression was accorded in previous cases:

a) *The persons to whom the offensive statements referred were not public officials or public figures.* The previous cases involved: a diplomat who represented Costa Rica before the International Atomic Energy Agency (IAEA) (Herrera Ulloa),<sup>10</sup> the former Attorney General of Panama (Tristán Donoso),<sup>11</sup> a candidate for the Presidency of Paraguay (Ricardo Canese),<sup>12</sup> the judge who intervened in the case of the murder of the Pallotine Fathers or the San Patricio massacre during the Argentine dictatorship (Kimel)<sup>13</sup> or the President of Argentina (Fontevécchia and D'Amico).<sup>14</sup>

b) *The matters to which the incriminating statements referred were not of public interest,* as they were in the preceding cases: supposed illegal activities (Herrera Ulloa);<sup>15</sup> revelation to third parties of a private telephone conversation and presumed unauthorized recording by the Attorney General (Tristán Donoso);<sup>16</sup> questioning of the integrity and suitability of a candidate for the Presidency by the Republic (Ricardo Canese, who was also a candidate for the Presidency),<sup>17</sup> failure by a judge to consider decisive evidence to elucidate the murder of several priests (Kimel),<sup>18</sup> or dissemination of photographs that presumably proved that the President of the Nation had a child from an extramarital relationship as a way of calling attention to the providing of large sums of money and

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<sup>10</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 95.d).

<sup>11</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para. 95.

<sup>12</sup> Cf. *Case of Ricardo Canese v. Paraguay*, *supra*, para. 69.1.

<sup>13</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 89.

<sup>14</sup> Cf. *Case of Fontevécchia and D'Amico v. Argentina*, *supra*, para. 60.

<sup>15</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 113.

<sup>16</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para.76.

<sup>17</sup> Cf. *Case of Ricardo Canese v. Paraguay*, *supra*, para. 94.

<sup>18</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 89.

expensive presents, and possibly other favors, by the then President to those who appeared in the photographs that were published (Fontevicchia and D'Amico).<sup>19</sup>

c) "*Excessive language*" was used, contrary to the preceding cases, in particular in the *Kimel* case, in which the Court stated that "Mr. Kimel did not use excessive language and based his opinion on the events verified by the journalist himself."<sup>20</sup> To the contrary, one or other of the Messrs. Mémoli, or both, accused the complainants as possible authors or accessories to the offense of fraud, referred to them as "criminals," "unscrupulous," "corrupt" and said that "they used subterfuges (*tretas*) and deceit (*manganetas*)."

### **III. Conclusion**

20. Based on all the above, I ratify my full endorsement of the judgment and issue this separate opinion in which I have emphasized some particularly important aspects.

Alberto Pérez Pérez  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>19</sup> Cf. *Case of Fontevicchia and D`Amico v. Argentina, supra*, paras. 62 to 64.

<sup>20</sup> *Case of Kimel v. Argentina, supra*, para. 92.